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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

TONY W. TATUM, Plaintiff and Appellant, v. ASSOCIATED RESIDENTIAL SERVICES, INC., Defendant and Respondent.	D069821 (Super. Ct. No. 37-2015-00025446-CU-WT-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Joel M. Pressman, Judge. Affirmed.

Tony W. Tatum, in pro. per., for Plaintiff and Appellant.

Klinedinst, Greg A. Garbacz, G. Dale Britton and Thomas E. Daugherty for Defendant and Respondent.

Plaintiff in propria persona Tony W. Tatum appeals the judgment of dismissal of his wrongful termination and retaliation complaint for damages against his former employer, defendant Associated Residential Services, Inc. (ARS). Tatum's complaint

alleged ARS retaliated against him by wrongfully terminating his employment in violation of Labor Code[1] sections 1102.5 and 6310 because he reported a safety concern to ARS and its licensing agency.

The trial court, citing *Murray v. Alaska Airlines, Inc.* (2010) 50 Cal.4th 860 (*Murray*), entered the judgment of dismissal after it sustained without leave to amend ARS's general demurrer to Tatum's complaint on the ground the "Retaliation Complaint" (retaliation complaint) Tatum previously had filed in this matter with the California Department of Industrial Relations (Department), Division of Labor Standards Enforcement (DLSE), in 2012—which also alleged ARS retaliated against him by wrongfully terminating his employment in violation of sections 1102.5 and 6310—had been "finally determined on the merits" and thus Tatum was "barred, as a matter of law, from re-litigating the same issues and same facts."

As best we can determine from Tatum's appellant's opening brief,[2] his principal contention is that the judgment of dismissal must be reversed because he met his burden of alleging facts sufficient to constitute a cause of action. We affirm the judgment.

BACKGROUND

ARS is a nonprofit organization that provides care and services to disadvantaged and underserved persons. Tatum began working for ARS in November 2009 as a child care worker in its residential group home.

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1 All further statutory references are to the Labor Code unless otherwise specified.

2 Tatum has not filed an appellant's reply brief.

A. *Tatum's Retaliation Complaint and the Labor Commissioner's Decision*

In late June 2012, Tatum filed a retaliation complaint with the DLSE alleging ARS retaliated against him by wrongfully terminating his employment in violation of sections 1102.5 and 6310 because he reported a safety concern to ARS and its licensing agency.

In August of that year, the Labor Commissioner of the Department issued a written decision (Labor Commissioner's decision) determining that Tatum was improperly terminated in retaliation for reporting a safety concern to ARS in violation of section 6310.

B. *ARS's Administrative Appeal and the Director's Determination Reversing the Labor Commissioner's Decision*

ARS challenged the Labor Commissioner's decision by filing with the Department a notice of appeal. ARS explained therein the grounds for its appeal.

In October 2014, the Department's Office of the Director provided notice to Tatum that ARS's appeal was pending and also provided him with a copy of ARS's written submission. The Department's notice informed Tatum that he was "not required to take any action while the appeal is on review with the Director," but he could "submit a written response to the appeal if [he chose] to [do so]," and the Labor Commissioner's office would "serve the Director's determination on all parties once it is completed."

Thereafter, ARS submitted supplemental briefing and evidence in support of its appeal. ARS's evidence included the declaration of Pablo Cruz, a former coworker of Tatum at ARS, who stated under oath that Tatum offered to pay him for providing "false testimony" (italics omitted) in support of his claims against ARS:

> "After Tatum left, he contacted me by telephone. He asked me whether I could provide him assistance in his plans to initiate some sort of legal proceedings against ARS. Specifically, he asked me what damaging information I knew of concerning ARS and its Executive Director, Mike Clawson. Tatum stated to me that he would provide me monetary compensation if I could assist him and specifically offered me $5,000 for false testimony adverse to ARS or Clawson. I declined these offers and told Tatum that I did not have any damaging information on ARS or Clawson."

ARS also submitted evidence that the San Diego County District Attorney charged Tatum in February 2009 with the commission of two felonies: assault by means likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1)) and battery with serious bodily injury (Pen. Code, § 243, subd. (d)). ARS also provided evidence that Tatum's spouse filed a domestic violence petition against him in March 1998.

On February 11, 2015, the Director of the Department issued her "Determination on Appeal from Decision of the State Labor Commissioner" (Director's determination), which reversed the Labor Commissioner's decision. The Director's determination stated in part:

> "The Director agrees with the Labor Commissioner that [Tatum] established a prima facie case of retaliation. The record supports a finding that [he] engaged in a protected activity, that [ARS] subjected [him] to an adverse action . . . . Here, the causal link can be inferred from the proximity of the protected activity and the adverse action.
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> "In rebuttal to the prima facie case of retaliation, [ARS] was required to offer a legitimate, non-retaliatory reason for the adverse employment actions. [ARS] met this burden by demonstrating that it had cause to suspend and terminate [Tatum]. The evidence shows that [Tatum]'s conduct violated [ARS]'s policies on professionalism and engaging clients at least on March 21, 2012, and May 16, 2012, which are grounds justifying termination."

The Director's determination also found that the evidence did not support a finding that ARS's concerns about Tatum's behavior were a pretext for his termination:

> "The record does not support a finding that [ARS]'s reason is a pretext for retaliation. [Tatum] presented little or no evidence that [ARS]'s legitimate, non-retaliatory reason for his termination was pretext or wrongful in any way. Indeed, the record includes evidence that [ARS] commended [Tatum] for reporting the safety issue that [he] contends formed the basis for retaliatory animus. This fact belies retaliatory animus on the part of [ARS]. Thus, the evidence does not support the Labor Commissioner's cause finding. [¶] Accordingly, the Labor Commissioner's Decision is reversed."

C. *Tatum's Superior Court Complaint*

In late July 2015, Tatum filed a complaint against ARS in the Superior Court of San Diego County, alleging three causes of action: (1) unlawful discharge and retaliation in violation of section 6310; (2) wrongful termination in violation of public policy, based on an alleged violation of section 6310; and (3) unlawful retaliation in violation of section 1102.5. Tatum's complaint alleged the same facts and claims he alleged in the unsuccessful retaliation complaint he filed with the Labor Commissioner; that is, ARS violated sections 1102.5 and 6310 by wrongfully terminating his employment in retaliation for his reporting an alleged safety concern to ARS and its licensing agency.

In his complaint, Tatum acknowledged that the Director's determination was a "[f]inal [d]etermination" against him. There is nothing in the appellate record to show that Tatum sought judicial review of the Director's determination pursuant to section 98.2, subdivision (a) (§ 98.2(a)), which provides that "[w]ithin 10 days after service of [the] decision, . . . the parties may seek review by filing an appeal to the superior court."

D. *ARS's Demurrer and the Court's Ruling and Judgment Dismissing Tatum's Complaint*

Citing *Murray*, *supra*, 50 Cal.4th 860, ARS demurred to Tatum's complaint, arguing that Tatum was barred as a matter of law, under the doctrines of res judicata and collateral estoppel, from relitigating the same claims and issues that had been finally decided against him on the merits in the Director's determination.

Acting in propria persona, Tatum opposed ARS's general demurrer, asserting his complaint stated facts sufficient to constitute a cause of action because he had "never filed nor litigated a previous lawsuit for money damages[] under any cause of action or claim," and "no court . . . ha[d] . . . made a final judgment on the merits."

1. *Ruling and judgment of dismissal*

Following a hearing, the court sustained ARS's demurrer without leave to amend, stating in its minute order:

> "[Tatum]'s claims of retaliation and wrongful termination under . . . sections 1102.5 and 6310 were raised by [his] complaint to the Labor Commissioner, along with his written statements and supporting documentation. [Citations.] . . . The Labor Commissioner's initial determination was reversed, and the [Director's determination] found that there was no retaliation and therefore no violation of . . . [sections] 1102.5 and 6310. [Citation.] *Because the administrative complaint was finally determined on the merits, [Tatum] is barred, as a matter of law, from re-litigating the same issues and same facts*." (Italics added.)

Based on this ruling, the count entered a judgment dismissing Tatum's complaint. Tatum's appeal followed.

I. *STANDARD OF REVIEW*

"A demurrer tests the legal sufficiency of factual allegations in a complaint." (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 42 (*Rakestraw*).) A general demurrer challenges the legal sufficiency of the complaint on the ground it fails to state facts sufficient to constitute a cause of action. (See Code Civ. Proc., § 430.10, subd. (e).)

In reviewing the legal sufficiency of a complaint against a general demurrer, this court treats the demurrer as admitting the truth of all properly pleaded or implied material factual allegations, but not the truth of contentions, deductions, or conclusions of fact or law. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081 (*Schifando*); *Rakestraw, supra,* 81 Cal.App.4th at p. 43.) This court also considers matters that may be judicially noticed. (*Rakestraw*, at p. 43.)

If the trial court sustained the general demurrer, the reviewing court determines de novo whether the complaint states facts sufficient to constitute a cause of action. (*Schifando, supra,* 31 Cal.4th at p. 1081; *Rakestraw, supra*, 81 Cal.App.4th at p. 43.) "On appeal, a *plaintiff* bears the burden of demonstrating that the trial court erroneously sustained the demurrer as a matter of law." (*Rakestraw,* at p. 43, italics added.)

In determining whether the court properly sustained the demurrer without leave to amend, the reviewing court decides whether there is a reasonable possibility an amendment could cure the pleading defect. (*Schifando, supra,* 31 Cal.4th at p. 1081; *Rakestraw, supra,* 81 Cal.App.4th at p. 43.) The *plaintiff* bears the burden of proving

there is a reasonable possibility an amendment would cure the pleading defect. (*Schifando*, at p. 1081.)

DISCUSSION

As noted, Tatum's principal contention is that the judgment of dismissal must be reversed because he met his burden of alleging facts sufficient to constitute a cause of action. ARS argues the court properly sustained ARS's demurrer to Tatum's complaint without leave to amend because the court properly found the complaint is barred by the doctrine of collateral estoppel. We affirm the judgment of dismissal because the court properly determined that Tatum's complaint was barred by the doctrine of collateral estoppel.

A. *Doctrine of Collateral Estoppel*

"Collateral estoppel is a distinct aspect of res judicata." (*Murray*, *supra*, 50 Cal.4th at p. 866.) The California Supreme Court has explained that " '[r]es judicata' describes the preclusive effect of a final judgment on the merits. Res judicata, or claim preclusion, prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them. Collateral estoppel, or issue preclusion, 'precludes relitigation of issues argued and decided in prior proceedings.' " (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896.) Collateral estoppel involves a second action between the same parties on a different cause of action; and the first action is not a complete merger or bar, but operates as an estoppel or conclusive adjudication as to any issues in the second action that were actually litigated and determined in the first action. (*Murray*, at p. 867.)

"It is settled that the doctrine of collateral estoppel or issue preclusion is applicable to final decisions of administrative agencies acting in a judicial or quasi-judicial capacity." (*Murray*, *supra*, 50 Cal.4th at p. 867.) Collateral estoppel "ha[s] specific application to Labor Commissioner decisions on . . . claims under section 98, by virtue of section 98.2, which gives the administrative order the force of a final, binding judgment in the event . . . the losing party does not seek judicial review of the administrative order." (*Noble v. Draper* (2008) 160 Cal.App.4th 1, 12, fns. omitted; see §§ 98, subd. (a)[3] & 98.2(a), subd. (d).)[4]

"Collateral estoppel precludes the relitigation of an issue only if (1) the issue is identical to an issue decided in a prior proceeding; (2) the issue was actually litigated; (3) the issue was necessarily decided; (4) the decision in the prior proceeding is final and on the merits; and (5) the party against whom collateral estoppel is asserted was a party to the prior proceeding or in privity with a party to the prior proceeding." (*Zevnik v.*

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3 Section 98, subdivision (a) provides in part: "The Labor Commissioner is authorized to investigate *employee complaints*. The Labor Commissioner may provide for a hearing in any action to recover *wages, penalties, and other demands for compensation* . . . , and shall determine all matters arising under his or her jurisdiction." (Italics added.) Here, the retaliation complaint Tatum filed with the DLSE pursuant to sections 1102.5 and 6310 stated that he was seeking "[c]ollection of unpaid wages, including unpaid overtime and [s]anctions for [r]etaliation by [t]ermination." Thus, by asserting a claim for unpaid wages, Tatum's retaliation complaint qualified as an "employee complaint[]" within the meaning of section 98. (See § 98, subd. (a).)

4 Section 98.2(a) provides in part: "Within 10 days after service of notice of an order, decision, or award the parties may seek review by filing an appeal to the superior court, where the appeal shall be heard de novo." Subdivision (d) of that section provides: "If no notice of appeal of the order, decision, or award is filed within the period set forth in subdivision (a), the order, decision, or award shall, in the absence of fraud, be deemed the final order."

Superior Court (2008) 159 Cal.App.4th 76, 82 (*Zevnik*), citing *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341.)

"The issue whether collateral estoppel applies is . . . a question of law, which question we review de novo." (*Jenkins v. County of Riverside* (2006) 138 Cal.App.4th 593, 618.)

B. *Analysis*

In sustaining without leave to amend ARS's general demurrer to Tatum's complaint, the court stated that Tatum's "claims of retaliation and wrongful termination under . . . sections 1102.5 and 6310 were raised by [his] complaint to the Labor Commissioner." The court also stated that "[b]ecause the administrative complaint was finally determined on the merits, [Tatum] is barred, as a matter of law, from re-litigating the same issues and same facts." Thus, the court's judgment dismissing Tatum's complaint was based on the court's implicit finding that the doctrine of collateral estoppel applied. We conclude the court did not err because all five requirements for application of the doctrine of collateral estoppel (discussed, *ante*) are fulfilled in this case.

1. "*Identical issue*" *requirement*

As noted, the first requirement for precluding relitigation of an issue under the doctrine of collateral estoppel is that "the issue [be] identical to an issue decided in a prior proceeding." (*Zevnik, supra*, 159 Cal.App.4th at p. 82.)

Here, the identical issue requirement is fulfilled. The record shows the principal issue litigated in the quasi-judicial administrative proceedings was whether ARS retaliated against Tatum by wrongfully terminating his employment in violation of

sections 1102.5 and 6310. Specifically, the record shows the letter dated October 5, 2012, from the DLSE's Retaliation Complaint Investigative Unit to ARS stated that Tatum had "filed a complaint with this Division alleging [he] suffered unlawful retaliation in violation of [sections] 1102.5 [and] 6310." A copy of Tatum's retaliation complaint against ARS was enclosed in that letter. In his retaliation complaint, Tatum alleged that ARS retaliated against him by wrongfully terminating his employment in violation of sections 1102.5 and 6310 because he reported a safety concern to ARS and its licensing agency.

In addition, the Labor Commissioner's decision stated, "The Labor Commissioner has determined that . . . Tatum . . . was terminated in retaliation for reporting a safety concern to [ARS]." The Labor Commissioner's decision explained that "section 6310 protects employees against retaliation for . . . making safety complaints directly to their employer." The record also shows the Director's determination reversing the Labor Commissioner's decision in favor of ARS determined that the facts "belie[d] retaliatory animus on the part of [ARS]."

The complaint for damages that Tatum filed against ARS in the superior court, which ARS's demurrer successfully challenged, raised the same issue he raised in the retaliation complaint he filed with the DLSE. The complaint he filed in the superior court alleged three causes of action: (1) unlawful discharge and retaliation in violation of section 6310; (2) wrongful termination in violation of public policy, based on an alleged violation of section 6310; and (3) unlawful retaliation in violation of section 1102.5. Tatum's complaint alleged the same facts and claims he alleged in the unsuccessful

retaliation complaint he filed with the DLSE, and it raised the same principal issue: whether ARS violated sections 1102.5 and 6310 by wrongfully terminating his employment in retaliation for his reporting an alleged safety concern to ARS and its licensing agency.

For the foregoing reasons, we conclude the first requirement for application of the doctrine of collateral estoppel is fulfilled.

2. "*Actually litigated issue*" *requirement*

The second requirement for precluding relitigation of an issue under the doctrine of collateral estoppel is that the issue must have been actually litigated in the prior proceeding. (*Zevnik*, *supra*, 159 Cal.App.4th at p. 82.)

"For purposes of collateral estoppel, an issue was actually litigated in a prior proceeding if it was properly raised, submitted for determination, and determined in that proceeding." (*Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 511.) "[T]he focus of our inquiry should be on whether the party against whom issue preclusion is being sought had 'an adequate opportunity to litigate' the factual finding or issue in the prior administrative proceeding." (*Murray*, *supra*, 50 Cal.4th at p. 869.)

Here, the actually litigated issue requirement is fulfilled. The record shows that in October 2014, after ARS appealed the Labor Commissioner's decision, the Department's Office of the Director provided notice to Tatum that ARS's appeal was pending, and also provided him with a copy of ARS's written submission. The Department's notice informed Tatum that he was "not required to take any action while the appeal is on review with the Director," but he could "submit a written response to the appeal if [he

chose] to [do so]," and the Labor Commissioner's office would "serve the Director's determination on all parties once it is completed." The foregoing shows that Tatum "had 'an adequate opportunity to litigate' the factual finding or issue in the prior administrative proceeding" (*Murray*, *supra*, 50 Cal.4th at p. 869).

3. "*Necessarily decided issue*" *requirement*

The third requirement for precluding relitigation of an issue under the doctrine of collateral estoppel is that the issue must have been necessarily decided in the prior proceeding. (*Zevnik*, *supra*, 159 Cal.App.4th at p. 82.)

Here, the necessarily decided issue requirement is fulfilled. As already discussed, the Director's determination reversed the Labor Commissioner's decision, and thereby rejected Tatum's claim that ARS retaliated against him by wrongfully terminating his employment in violation of sections 1102.5 and 6310, finding that the facts "belie[d] retaliatory animus on the part of [ARS]."

4. "*Final decision on the merits*" *requirement*

The fourth requirement for precluding relitigation of an issue under the doctrine of collateral estoppel is that the decision in the prior proceeding be final and on the merits. (*Zevnik*, *supra*, 159 Cal.App.4th at p. 82.) This requirement is also fulfilled.

Section 98.2(a) provides in part that "[w]ithin 10 days after service of notice of [a] decision . . . the parties may seek review by filing an appeal to the superior court, where the appeal shall be heard de novo." Section 98.2, subdivision (d) provides in part that, "[i]f no notice of appeal of the . . . decision . . . is filed within the period set forth in subdivision (a), the . . . decision . . . shall . . . be deemed the final order."

Here, Tatum judicially admitted in his complaint that the Director's determination was a "[f]inal [d]etermination" against him. We note there is nothing in the appellate record to show that Tatum timely sought judicial review of the Director's determination, as he was entitled to do pursuant to section 98.2(a). Tatum does not dispute that the Director's determination was a decision on the merits. Thus, we conclude the Director's determination was a final decision on the merits of Tatum's claim that ARS violated sections 1102.5 and 6310 by wrongfully terminating his employment in retaliation for his reporting an alleged safety concern. (See § 98.2(a), subd. (d).) Accordingly, we also conclude the final decision on the merits requirement is fulfilled.

5. "*Same party*" *requirement*

The fifth and last requirement for precluding relitigation of an issue under the doctrine of collateral estoppel is that the party against whom collateral estoppel is asserted was a party to the prior proceeding or in privity with a party to the prior proceeding. (*Zevnik*, *supra*, 159 Cal.App.4th at p. 82.)

Here, it is undisputed that Tatum was a party to the prior quasi-judicial administrative proceeding that ended with the Director's determination, which was final and rejected Tatum's claim on the merits, and Tatum is also the party against whom ARS asserted the doctrine of collateral estoppel in its general demurrer to Tatum's complaint, in which he asserted the same claim. Thus, we conclude the same party requirement is fulfilled.

For all of the foregoing reasons, we conclude the court properly determined that Tatum's complaint is barred by the doctrine of collateral estoppel. Accordingly, we affirm the judgment of dismissal.

DISPOSITION

The judgment is affirmed. Associated Residential Services, Inc., shall recover its costs on appeal.

NARES, J.

WE CONCUR:

BENKE, Acting P. J.

HUFFMAN, J.